

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6161

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
LLEWELYN S. BAILEY,

Plaintiff-Appellant,

-against-

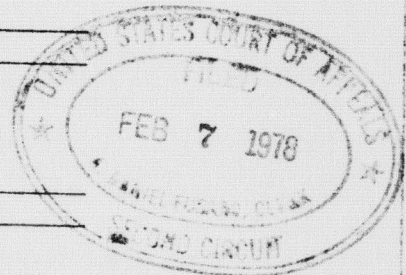
VETERAN'S ADMINISTRATION,

Defendant-Appellant.
-----X

Docket No.:

77-6161

BRIEF FOR APPELLANT
LLEWELYN S. BAILEY



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

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TABLE OF CONTENTS

	Page
Issues Presented	1
Statement of Case	2
Statement of Facts	4
The Agency's Case	4
Bailey's Case	7
Relevant Regulations	12
ARGUMENT:	
POINT I- Bailey's Removal was Arbitrary and Capricious	15
POINT II- There Was No Substantial Evidence to Support Bailey's Removal	17
CONCLUSION	18

TABLE OF CASES

Arnett v. Kennedy, 416 U.S. 134 (1974)	15
C.S.C. v. Letter Carriers 413 U.S. 548, 578-579 (1973)	15
White v. Bloomberg 345 F. Supp. 133 (1972) at 144	16
Norton v. Macy 135 U.S. 417 F2d 1161 (1969)	16
Alsbury v. U.S. Postal Service 530 F2d 852	17

TABLE OF STATUTES AND REGULATIONS

5 C.F.R. §752	12, 13, 14
5 U.S.C. §7501	15

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BRIEF FOR APPELLANT
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ISSUES PRESENTED

Whether Plaintiff-Appellant's
removal was arbitrary and capricious
and whether there was substantial
evidence to support the removal.

STATEMENT Of The CASE

Plaintiff Llewelyn S. Bailey seeks review of a final judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, J., granting defendant's motion for summary judgment and dismissing Bailey's complaint for reinstatement as a hospital Supervisory Police Officer with the Veterans Administration (the "VA").

Bailey was hired by the VA in 1974 as a Hospital Police Officer. Assigned to the VA Hospital at 24th Street and First Avenue in Manhattan, Bailey was promoted in early 1975 to Supervisory Police Officer, a position that he held until he was fired on July 13, 1976. (A-246) Bailey's removal resulted from a complaint by Mr. Harold Schwartz, who charged that Bailey had punched and otherwise assaulted him on the evening of May 14, 1976, when Schwartz was visiting a patient at the hospital. After his removal by the VA, Bailey appealed to the United States Civil Service Commission, Federal Employees Appeals Authority ("FEAA") pursuant to Part 752, Subpart B, of the Civil Service Regulations, 5 C.F.R. §752. At Bailey's request, FEAA conducted a hearing on September 14, 1976 to determine whether the VA was justified in removing Bailey. On the basis of the entire administrative record, including the testimony of all witnesses at the September 14, 1977 hearing, FEAA affirmed the VA's removal action and denied Bailey's appeal. The FEAA's decision constituted final agency action. 5 C.F.R. §772.309 (b).

Bailey then brought suit in the United States District Court, seeking judicial review of his removal. On May 6, 1977, Bailey filed a motion asking for reinstatement with full compensation. Defendant construed Bailey's motion as one for summary judgment and cross-moved for judgment on June 7, 1977. The transcript of the administrative record was submitted by defendant as an exhibit to its motion papers. On the basis of the administrative record, the District Court concluded that FEAA's decision was supported by substantial evidence and was not arbitrary, capricious or an abuse of discretion. Judgment was entered for defendant on August 31, 1977. Bailey filed a timely Notice of Appeal to this Court on September 29, 1977.

STATEMENT OF FACTS

At the hearing held on September 14, 1976 the VA was represented by James Forsetta, Hospital Administrative Officer. (A-10) Bailey was present throughout the hearing and was represented by counsel, Julian Linker, Esq. (A-10) The hearing was conducted by Assistant Appeals Officer Dennis Marachi and the testimony of all witnesses was taken under oath.

TH AGENCY'S CASE

Harold Schwartz, testified that he was a self-employed consultant in the fields of electronics engineering and business planning (A-18), and that on the evening of May 14, 1976, he was visiting a friend, Mr. Joseph Kaswan, who was a patient at the VA Hospital. (A-19) At approximately 8:50 p.m. Kaswan, who was wheelchair-bound, accompanied Schwartz to the street level. (A-19),

While Schwartz was on his way to the door, a guard later identified as Bailey, said something which was inaudible to Schwartz and Kaswan (A-19), and Kaswan replied, "I beg your pardon. I couldn't hear you." (A-20) The guard Llewelyn Bailey, with his back to Kaswan and Schwartz, again said something inaudible, and Kaswan again stated, "I'm sorry. I still can't hear you." (A-20) Bailey then turned around and stated that Kaswan had heard very well what he had said. Schwartz then objected to Bailey's calling Kaswan a liar. Bailey moved towards Schwartz saying, "You're not supposed to be here now, " and then grabbed Schwartz by the arm (A-20) and started pulling him toward a back room. (A-21)

Schwartz refused to go with the hospital security guard, Bailey.

Another guard explained what was going on and indicated he would come along too. (A-23) Schwartz went with the guards into a room behind the desk. Mr. Kaswan also wanted to enter but the guards indicated he was to stay outside. He testified he was asked for identification and initially refused to give the identification. Guards continually came in and out, during that interval. (A-56) Schwartz further testified that Bailey struck him while he, Schwartz stood by the door, and struck him almost in the center of his jaw. (A-61)

Schwartz didn't remember telling any guard about the incident after being struck on the jaw. (A-64) He recalls the window shade snapped up very sharply when officer Bailey's elbow struck it prior to hitting him. (A-65) Kaswan and officer Parker along with another officer were outside the room at the time Schwartz was struck. Schwartz testified his face was slightly swollen and there were bruises on his upper arm where officer Bailey grabbed him and that the skin was slightly broken. (A-30) However he sought no medical attention. (A-31)

Joseph Kaswan a patient in the hospital at the time of the May 14th incident testified that Schwartz while visiting him in the hospital stayed beyond the period for visiting hours. The two men subsequently went down to the lobby. (A-82) Someone he believed to be officer Bailey said something he couldn't hear. That officer Bailey turned around and said "You heard me." (A-83) Schwartz responded to Bailey in an angry voice, Bailey became angry and rushed over to Schwartz. (A-84) Bailey pulled Schwartz and other guards came, (A-85) and that Schwartz

was behind a desk. That Schwartz was taken in a room and that guards were continually in and out of the room. The door closed and the shade was pulled down and Kaswan's view was blocked. (A86) All of a sudden the shade flew up and he testified he saw Bailey with his back to Kaswan swing his arm and strike Schwartz's face. (A-87) He testified further that he told Schwartz, "I'll support you in every way I can." When Schwartz left the room he saw nothing wrong with his face. (A-111)

Police Officer William Parker was called by the VA. Parker stated that on May 14, 1976 at about nine o'clock he heard talking in the lobby of the V.A. hospital and that Bailey told Schwartz visiting hours had ended at eight o'clock. (A-21) Bailey requested that Schwartz come into the security office and Bailey escorted him into the office. (A-122) Parker testified he re-entered the room after the patient told him that his friend was being hit and that Bailey and Schwartz were arguing and he separated them. Parker requested that Schwartz give officer Bailey his I.D. Schwartz refused but subsequently gave the Identification to Officer Parker. (A-124) Parker testified that it was normal procedure to ask someone to go into the office and that he didn't recall Bailey using excessive force to get into the office or that Schwartz resisted going physically. However he testified that Schwartz had refused to go into the office. (A-150)

Officer Parker testified in sum, that he did not witness any striking of Schwartz by Bailey, however both Kaswan and Schwartz had indicated to him that officer Bailey had struck Schwartz.

The final witness called by the VA was David R. Siley,

Chief of the Hospital Security. (A-165) Siley stated that on May 17, 1977 he received a communication from the Assistant Hospital Director advising him of a complaint by Kaswan that Bailey had abused and assaulted a visitor. Siley attempted to interview Kaswan on three occasions before Kaswan's discharge, but could not locate him. (A-166) Siley stated that he had notified Bailey of the complaint in person the very next time Bailey came on duty (A-167), and Bailey had responded that Schwartz had refused to leave the hospital, that Bailey had given him two summonses, and that nothing more had happened. (A-167) Siley spoke to Parker a couple of days after talking to Bailey (A-168) and at that time, Parker told Siley about Kaswan shouting "he hit my friend" and about Parker's separating Bailey and Schwartz. (A-169)

Siley testified that Kaswan and Schwartz came to the hospital and made a complaint on June 3, 1976. The very next day, Bailey was told by Michael Horton, the Chief of Internal Service, in Siley's presence, that a serious complaint had been filed against him. Bailey remained in Horton's office for about three-quarters of an hour discussing the May 14 incident.

BAILEY'S CASE

At the close of the VA's case (A-203), Officer Bailey's first witness, Samuel B. Mitzner testified that he had repaired shades in his own house and the houses of his wife and grandfather. (A-206) Mitzner's testimony was that on the day before the September 14, 1976, hearing, he accompanied Linker to the VA hospital and tested the shade on the door of the room where Bailey had allegedly struck Schwartz (A-208), but the shade did not fly

up when Mitzner hit it.

Bailey's second witness was Michael Everett, president of the local union of which Bailey was a member. (A-22) Everett testified that Bailey should have been accompanied by a union representative to the June 4 interview with Horton and Siley according to the union's contract. (A-232) No copy of the union contract was introduced at the hearing, however, and the VA's representative, Mr. Forsetta, refused to stipulate to the existence of such a provision because he said he was familiar with the contract and it did not contain such a provision. (A-237) The hearing examiner left the proceeding open for ten days for the limited purpose of permitting Everett to submit a copy of the agreement, having been submitted, the examiner found that it did not contain a provision for notification to an employee of his right to representation even at a grievance procedure. (A-302)

Llewelyn S. Bailey, Hospital Police Supervisor, in Administration (A-243) testified he was born in Jamaica in the West Indies and that he was a Police Constable from February 1959 until 1966 and that he was given a certificate of merit, a certificate of good conduct from the Police department in Jamaica, (A-244) and that there were never any charges of any kind brought against him while he was a Police Constable. He had an exemplary record and subsequently he migrated to the United States of America in November of 1966, where his first employment was as a housing patrolman for the Metropolitan Life Insurance Company. He performed his duties in a manner that led to no complaints of any kind being brought against him. (A-245)

In April of 1974 he commenced working for the Veteran's Administration as an officer. Subsequently within an eight month period he was promoted from G.S.5 to G.S.6, a Hospital Police Supervisor. Officer Bailey testified he had always conducted himself in a proper manner in accordance with regulations and this was the first incident of any kind that had ever been brought to his attention regarding his conduct.

Officer Bailey indicated he had given out approximately fifteen summonses during the two year period of time he worked for the VA. (A-248)

On May 14, 1976, visiting hours ended at eight o'clock, at nine o'clock he "scaled" the main entrance door, turned down the lobby lights and cordoned off the elevator area. (A-249) A sign was placed indicating that the lobby was closed.

At about ten minutes after nine o'clock he saw Schwartz and Kaswan who was in a wheelchair. Bailey testified he said, "Sir, No patients are allowed in the lobby." Schwartz said, "Don't ever talk to my friend like that, he's a veteran." Bailey told Schwartz it was ten after nine and that visiting hours were over at eight o'clock and that he should leave the premises and that the patient should return to his room. Schwartz rushed back to Kaswan and said did you hear him call me a liar. Officer Bailey ordered Schwartz to leave the premises and Schwartz refused. Bailey took him by the left arm and started towards the office with him. Schwartz didn't want to go until Parker arrived and took him by the right arm. They both escorted him to the office, the door was closed. Bailey told him he was going to issue two summonses. Bailey asked for identification and

Schwartz refused. (A-255) He showed his I.D. when Bailey told him that arresting him would be the next step if no identification were shown. While the summonses were being written by Bailey Schwartz got up. Bailey asked him to sit down. Schwartz said he didn't want to sit and Bailey continued writing the two summonses. He gave the summonses to Schwartz who then left.

Officer Bailey denied striking Schwartz or hearing anyone comment that he had hit anyone. Bailey went out to the desk where he saw Schwartz go through the door and Kaswan go upstairs. The first time he was aware of a May 14, 1976, incident was June 4th of that year. (A-259) Nothing was said to Bailey between the day it happened and June 4.

That on June 4th, he was given five days administrative leave. That he returned on June 11th, he was given a letter dated June 10th indicating his proposed removal. (A-263

The hearing examiner permitted closing statements by Forsetta for the VA (A-281-283), and Linker for Bailey (A-285-295), after which the hearing was closed.

RELEVANT REGULATIONS

5 C.F.R. §752.202 Procedures.

(a) Notice of proposed adverse action.

(1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

(3) Material which cannot be disclosed to the employee, or to his designated physician under §294.40, of this chapter, may not be used by an agency to support the reasons in the notice.

(b) Employee's answer. Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employer believes might sway the final decision of his case, but does not include the right to a trial or formal hearing with examination of witnesses.

When the employee requests an opportunity to answer personally, the agency shall make a representative available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

(c) Exceptions to notice period and opportunity to prepare answer.

(1) Advance written notice and opportunity to answer are not necessary in cases of furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or emergencies requiring immediate curtailment of activities.

(2) When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency is not required to give the employee the full 30 days' advance written notice, but shall give him such less number of days advance notice and opportunity to answer as under the circumstances is reasonable and can be justified.

(d) Duty status during notice period. Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period. When circumstances are such that the retention of the employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, the agency may temporarily assign him to duties in which these conditions will not exist or place him on leave with his consent.

(e) Suspensions during notice period. In an emergency case when, because of the circumstances described in paragraph (d) of this section, an employee cannot be kept in an active duty status during the notice period, the agency may suspend him. This suspension is a separate adverse action. An employee whose suspension under this paragraph is proposed is entitled, in connection with the suspension, to the following:

(1) If the suspension is for more than 30 days, to the procedures required by this subpart;

(2) If the suspension is for 30 days or less and the employee is covered under §752.301, to the procedures required by Subpart C of this part; or

(3) If the suspension is for 30 days or less and the employee is in the excepted service and not covered by §752.301, to a written notice at least 24 hours in advance of the effective date of the suspension. The agency shall include in the notice of suspension the reasons for not retaining the employee in an active duty status during the notice period. If the employee appeals from the final adverse decision, the Commission reviews the reason for not retaining him in an active duty status to determine staff consonance with the circumstances described in paragraph (d) of this section. The agency may place the employee on a non-duty status with pay for such time, not to exceed 5 days, as is necessary to effect the suspension.

(f) Notice of adverse decision. The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when there is one, than the official who proposed the adverse action. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the Commission;

(3) Of the time limit for appealing as provided in section 752.203; and

(4) Where he may obtain information on how to pursue an appeal.

ARGUMENT

POINT I

BAILEY'S REMOVAL WAS ARBITRARY AND CAPRICIOUS

By letter dated July 7, 1976, Bailey was removed effective July 13, 1976. (A-310) Subsequently after a hearing, Denis Marachi, Assistant Appeals Officer of the United States Civil Service Commission affirmed stating, "... we conclude, based on a preponderance of the credible evidence of record, that the agency's stated reason for the removal action is sustained, and that the penalty of removal is not under the circumstances herein, unreasonable, arbitrary or capricious, but is for such cause as will promote the efficiency of the service." (A-306)

Title 5, United States Code, Section 7501, provides in part:

§7501, Cause; procedure; exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

It may be true that the language permitting removal "for such cause as will promote the efficiency of the service" is not subject to attack on charges of overbreadth or vagueness. *C.S.C. v. Letter Carriers*, 413 U.S. 548, 578-579, (1973); *Arnett v. Kennedy*, 416 U.S. 159.

However, "an employer agency cannot justify a discharge merely by reciting in conclusory fashion the language of the

statute." White v. Bloomberg, 345 F. Supp. 133 (1972) at 144.

There must be a "rational basis" for the agency's conclusion which must be demonstrated in order to arrive at the conclusion that a discharge "will promote the efficiency of the service". Norton v. Macy, 135 U.S. APP.D.C. 214, 417 F2d 1161 (1969)

The allegations against Bailey involved one instance of an alleged striking of a visitor. There was no multiplicity of acts involved or a continuing course of conduct. Bailey's removal was therefore arbitrary and capricious in that there was no showing by the Agency that his removal per se "would promote the efficiency of the service."

ARGUMENT

POINT II

THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT BAILEY'S REMOVAL

Llewelyn Bailey testified that he had been a police constable in Jamaica in the West Indies from 1959 until 1966, and that upon migrating to the United States, he worked as a security guard for Metropolitan Life.

He testified that he never struck Schwartz.

Kaswan and Schwartz testified that Bailey had struck Schwartz. Kaswan admittedly stated I'll support you any way I can. Such a statement in light of their relationship as friends, showed bias on Kaswan's part. Officer Parker did not see Bailey strike Schwartz and the evidence indicates that officers were continually in and out of the room where that alleged incident took place. Such circumstances would thereby tend to lessen the likelihood such an incident took place.

The issue of whether there was substantial evidence is a proper subject for judicial review together with the issue of whether the employee's dismissal was arbitrary and capricious. *Alsbury v. U.S. Postal Service* C.A. Cal 1976, 530 F2d 852.

CONCLUSION

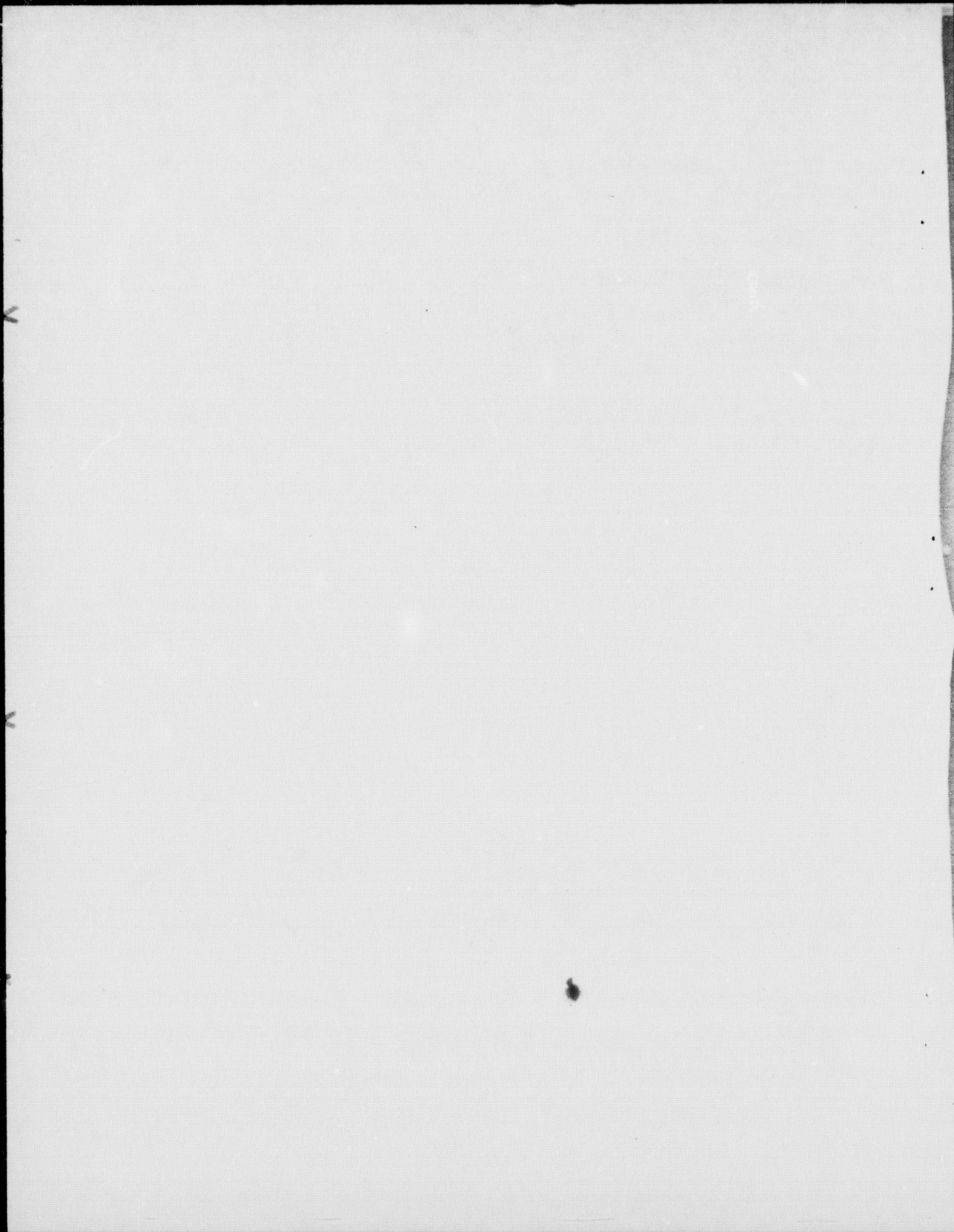
THE DECISION OF THE FEAA AFFIRMING THE REMOVAL OF APPELLANT FROM THE POSITION OF HOSPITAL SUPERVISORY POLICE OFFICER WAS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT AND THAT JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

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State of New York, County of Kings

SS.: Thedelma J. Lilly

That February 7, 1978 at 12:10 at One St. Andrew's Plaza, New York, New York
deponent served the within Brief for Appellant Llewelyn S. Bailey
on the United States Attorney by delivering a true copy thereof to
Pauline Inoué whom deponent knew to be authorized to accept service
on behalf of the United States Attorney.

Thedelma J. Lilly
Thedelma J. Lilly
755570

Sworn to me this 7^{*} day of February 1978

Michelle Karshan
MICHELLE KARSHAN
COMMISSIONER OF DEEDS
CITY OF NEW YORK 2-2594
Certificate filed in Kings County
Commission Expires August 1, 1978